NO. 12446

In the United States Court of Appeals for the Ninth Circuit

H. W. SMITH, (d/b/a) A-1 PHOTO SERVICE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

AUG 28 1950

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In the United States Court of Appeals for the Ninth Circuit

NO. 12446

H. W. Smith, (d/b/a) A-1 Photo Service, petitioner

v.

National Labor Relations Board, respondent

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of H. W. Smith, d/b/a A-1 Photo Service (hereinafter called "A-1 Photo" or "petitioner"), filed pursuant to Section 10 (f) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151 *et seq.*), to review an order of the National Labor Relations Board. The Board's order (R. 59-60), which was issued in a proceeding under Section 10 of the Act, dismissed an unfair labor practice complaint (R. 80-87) that had been issued by the General Counsel of the Board upon charges filed by petitioner (R. 78-79). This Court has jurisdiction under Section 10 (f) of the Act, for petitioner transacts business in San Pedro, California, within this judicial circuit.

STATEMENT OF THE CASE

1. The initial stages of the unfair labor practice proceeding

On April 5, 1948, A-1 Photo filed an amended unfair labor practice charge with the Board's Regional Director for the Twenty-first Region. This charge, docketed as "Case No. 21-CB-34", alleged that Local 905 of the Retail Clerks International Association, AFL (hereinafter called "the Union"), and certain officials of the Union, were engaging in unfair labor practices within the meaning of Sections 8 (b) (1) (A), (2) and (3) of the Act[1]. (R. 2-3, 78-79.)

On April 7, 1948, the General Counsel of the Board, acting through the Regional Director and pursuant to Section 3 (d), issued an unfair labor practice complaint based upon the foregoing charge (R.80-87). A hearing was then held before a Trial Examiner, who issued his Intermediate Report on July 19, 1948 (R. 2-44).

The Trial Examiner found that the business involved was a retail store located in San Pedro, California; that the store was engaged in buying and selling photographic equipment and supplies, greeting cards and stationery; and that it regularly employed only three clerks (R. 7, 10). He further found that, during the period April 1947 through March 1948, this store purchased supplies totaling $100,146.69, of which 44 percent was obtained from wholesalers located outside the State of California. The balance of the supplies was purchased from wholesalers located in California, who, in turn, had obtained a sub-

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[1]These and other relevant sections of the Act are set forth on pp. 54-65 of the Board's brief in *Haleston Drug Stores, Inc.*, v. *NLRB*, No. 12412, in this Court. Since the instant case and the *Haleston* case involve the same legal issue, this Court has consolidated them for purposes of oral argument.

stantial portion of such supplies from out-of-state. (R. 7-8.) During a comparable period, sales at the San Pedro store totalled $133,715.51, all of which, except for a minor quantity[2], were made to retail customers within the State of California (R. 9-10).

Upon these facts, the Trial Examiner concluded, contrary to the contention of respondent Union, that A-1 Photo was engaged in commerce within the meaning of the Act, and that therefore the Board, as a matter of law, had jurisdiction of the case (R. 10-11, 39). The Trial Examiner, however, noted that (R. 10-11):

> On occasion the Board has declined to exercise its jurisdiction over retail enterprises similar to that of the Employer, but such action has been based on policy considerations not properly within the province of the undersigned. The sole issue confronting the undersigned is whether the Board has jurisdiction over the case at bar, not whether, as a matter of public policy, it should assert it.

As to the merits, the Trial Examiner found that the Union and its Secretary, Haskell Tidwell, had refused to bargain collectively in violation of Section 8 (b) (3) of the Act, but had not committed any of the other unfair labor practices alleged in the complaint (R. 41). The Trial Examiner recommended an appropriate remedy for curing the violation of Section 8 (b) (3), and further recommended that the remainder of the complaint be dismissed (R. 41-43).

Both the Union and the General Counsel filed excep-

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[2]Merchandise valued at approximately $600 was delivered to customers outside of California, and merchandise valued at about $2400 was sold and delivered to installations of the United States Army and Navy (R. 10).

tions to the Trial Examiner's Intermediate Report (R. 45-50).

II. The Decision and Order of the Board sought to be reviewed

On May 13, 1949, the Board, after considering the entire record in the proceeding and the exceptions of the parties, entered an order dismissing the complaint in its entirety (R. 51-60).

The Board accepted the commerce facts found by the Trial Examiner and did not disturb his conclusion therefrom that, as a matter of law, A-1 Photo was engaged in commerce within the meaning of the Act and thus subject to the jurisdiction of the Board (R. 51-53). However, the Board added (R. 53):

> It is clear to us .... that the Employer's business is essentially local in nature and relatively small in size, and that interruption of his operations by a labor dispute could have only the most remote and insubstantial effect on commerce. Recently, we have dismissed several proceedings involving such enterprises, on the ground that the assertion of jurisdiction would not effectuate the purpose of the Act [footnote omitted]. The Respondents urge that we dismiss this proceeding for the same reason.

The Board then gave careful consideration to the General Counsel's contention that, "once he has issued a complaint in an unfair labor practice case, the Board Members have no authority to decline to assert jurisdiction on policy grounds, if jurisdiction in fact exists" (R. 53-58). The Board concluded, *inter alia,* that neither the provisions of Section 3 (d) of the amended Act nor the intention of Congress to effect a separation of the judicial and prosecuting functions of the agency deprived the

Board of the discretionary authority, which it had under the Wagner Act, "to dismiss complaints for policy reasons, even though commerce is affected" (R. 53-59).

The Board further concluded (R. 59):

> We believe that, in the absence of special circumstances, it is a proper exercise of such discretion to dismiss cases in which, as here, the business involved is so small and so local in nature that the interruption of operations by a labor dispute could have only a remote and insubstantial effect on commerce. We shall therefore dismiss this complaint in its entirety.

On June 16, 1949, the General Counsel requested the Board to reconsider its Decision and Order (R. 60-77).[3] On June 30, 1949, the Board denied this request, "for reasons stated in the said Decision and Order" (R. 77).

ARGUMENT

INTRODUCTION

As petitioner concedes (Br., pp. 4, 6), the sole issue here is whether, after the General Counsel of the Board has issued an unfair labor practice complaint, the Board has discretionary authority to dismiss the complaint if it finds that, because the business involved has only a remote and insubstantial effect on commerce, the assertion of jurisdiction would not effectuate the policies of

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[3] Before decision, the General Counsel had set forth his position, that the Board lacked power to dismiss for policy reasons, in a supplemental brief and in oral argument before the Board. Petitioner, on the other hand, at no point contested the Board's power. It did not request oral argument; did not, although granted oportunity, file a brief (see Board's telegram dated October 26, 1948, included in the full transcript of record filed with this Court); nor did it request a reconsideration of the Board's decision.

the Act. This issue is identical with the principal question involved in the *Haleston* case, now pending argument before this Court as *Haleston Drug Stores, Inc.* v. *N. L. R. B.*, No. 12412 (see n. 1, p. 2, *supra*). Since the Board's brief in the *Haleston* case fully treats this question, we respectfully refer the Court thereto (pp. 9-43)[4]. The Board's brief in the case at bar, accordingly, will be confined to those of petitioner's arguments which, although treated in the Board's *Haleston* brief, we believe might be answered more fully at this time.

POINT I.

As an incident of separating prosecutory and adjudicatory functions, Congress did not intend that the issuance of a complaint by the General Counsel would preclude the Board from ultimately deciding what best effectuates the policies of the Act

Before issuing the complaint involved here, the General Counsel, through his agent the Regional Director, presumably decided, as petitioner states (Br., p. 5), that: (1) there was probable cause to believe that unfair labor practices were committed; (2) there was probable cause to believe that the Board had jurisdiction to correct such misconduct; and (3) the nature of these unfair labor practices and their effect upon commerce was sufficient to warrant initiation of formal proceedings. Petitioner concedes (Br., p. 6) that, after prosecution of the case has been completed and it comes to the Board for decision, the Board is free to overturn the General Counsel's judgment on items (1) and (2); it urges, however, that the Board may not do so on item (3). The conclusion as

[4]The Board's brief in the *Haleston* case (hereafter referred to as "*Haleston* brief") is now on file with the Clerk of the Court, and the Board will serve petitioner herein with copies of that brief at the same time the instant brief is served.

to item (3) rests on the assumption that, unless "the decision of the General Counsel that the case is worthy of prosecution [is] accepted as conclusive" (Br., p. 9), the "final authority", which Section 3 (d) confers upon the General Counsel in respect of the investigation of charges and issuance of complaints, is negated.

We have shown in the *Haleston* brief (pp. 25-26) that, from the standpoint of both substance and procedure, there is no difference between a Board decision which reverses the General Counsel on items (1) and (2), and one which, as here, reverses the General Counsel's policy judgment (item (3)). Accordingly, since petitioner concedes that the former type of Board decision does not invade the General Counsel's final authority under Section 3 (d), it should follow that neither does the latter type of Board decision.

Petitioner's answer (Br., pp. 17-30) is that Congress intended, as an incident of separating prosecutory and adjudicatory functions, to vest the General Counsel with exclusive discretion to determine what cases the Board must decide on the merits, and to confine the Board to the sterile function of determining "whether there is jurisdiction in fact and whether or not unfair labor practices were committed" (Br., p. 29). We submit that petitioner has misconceived the purpose which Congress sought to achieve by separating functions within the agency, and the respective roles which it assigned to the General Counsel and the Board.

A. The historical setting from which Section 3 (d) emerged

The condition which Congress, by section 3 (d), sought to eradicate is not novel, nor even peculiar to the National Labor Relations Board. For the past twenty years, there has been a growing concern over the blending within a single administrative agency of both the power to initiate

prosecution and the power to decide whether the conduct in issue actually warrants imposition of a sanction[5]. Such blending of powers has been condemned on several grounds. Dean Landis has phrased the objection as follows:[6]

> A first and fundamental principle of natural justice is that no man shall be judge in his own cause; a tribunal that has enforcing functions has by that fact an interest in the outcome of the litigation to which it is a party and hence should not take part in the process of decision. That psychological interest .... may be more compelling than even a pecuniary interest, inasmuch as the tribunal will feel under some pressure to defend a policy which it may have initiated, or at least to establish the fact that its earlier judgment was justified.

The President's Committee on Administrative Management added:[7]

> [Blending of prosecutory and adjudicatory functions] not only undermines judicial fairness; it weakens public confidence in that fairness. Com-

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[5]See Landis, *The Administrative Process* (Yale, 1938), pp. 91-92; *Report of the Committee on Ministers' Powers* (1932, Cmd 4060), pp. 76-79; 61 A. B. A. Rep. 735 (1936); *Administrative Management in the Government of the United States, Report of the President's Committee on Administrative Management* (Gov't Print. Off., 1937), pp. 39-42; *Final Report of the Attorney General's Committee on Administrative Procedure* (Gov't Print. Off., 1941), pp. 55-60, 203-209, 249; Benjamin, *Administrative Adjudication in the State of New York* (1942), pp. 47-66.

[6]Landis, *op. cit*, p. 92.

[7]*Report, op. cit*, p. 40. See also, Gellhorn, *Federal Administrative Proceedings* (Johns Hopkins, 1941), p. 18, quoted in *Haleston* brief, p. 30.

> mission decisions ... lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself.

To meet these objections, numerous proposals were advanced for "separating functions" — ranging from devices for segration within the existing agency to the creation of two separate bodies, one to handle prosecution and the other, adjudication.[8] Congress, after many years of sifting through these various proposals, enacted the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Secs. 1001, *et seq.*). This Act, which essentially reflects the recommendations of the majority members of the Attorney General's Committee on Administrative Procedure,[9] seeks to solve the problem by a form of internal segregation — i.e, insulating the agency's hearing officers from agency employees who engage in prosecutory functions, and guaranteeing salary and tenure independence to these officers.[10]

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[8]See Cushman, *The Independent Regulatory Commissions* (Oxford, 1941), pp. 708-725; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36-45; Davis, *Separation of Functions*, 61 Harv. L. Rev. 389, 395 ff.

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[9]*Final Report, op. cit*, pp. 46-60.

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[10]Thus Section 5 (c) of that Act provides, in part:

> " . . . no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency . . ."

Section 11 contains the provisions with respect to salary and tenure of hearing officers. See also, *Administrative Procedure Act, Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess., pp. 24-25, 361-362. Cf. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33.

The foregoing campaign to effect a separation of functions in the administrative process usually included among its arguments the unfair labor practice procedure of the Wagner Act. This procedure, it was pointed out, worked in practice as follows: When an unfair labor practice charge was filed in a regional office it was assigned to a field examiner for investigation; a report on his investigation was forwarded to the Board in Washington, where it was referred to a committte designated by the Board; this committee digested the field examiner's report and presented the matter orally to the Board, which then decided whether a complaint should issue. By thus playing a part in the issuance of the complaint, critics argued that the Board could not avoid prejudging the case, for it had before it affidavits of witnesses compiled by the field examiner comprising the evidence which would be presented at the trial; a summary of the defendant employer's defense to the charges; and analyses of the law prepared by both the regional and Washington legal staffs.[11] Accordingly, these critics concluded that the Board's ultimate adjudication was "unfair and biased" — a mere rationalization of a predetermined result.[12]

Just as broad-scale proposals had been advanced to mitigate blending of functions in the administrative pro-

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[11]See *Hearings before Senate Committee on Education and Labor on Proposed Amendments to NLRA*, 76th Cong, 1st Sess., pp. 42-43, 49-50; H. Rep. No. 1902, Part 1, 76th Cong., 3d Sess., pp. 89-90; Johnson, *The National Labor Relations Act, Should It Be Amended* (H. W. Wilson Co., 1940), pp. 63-67, 283-284; Gellhorn & Linfield, *Politics and Labor Relations*, 39 Col. L. Rev. 339, 385 (1939); Davey, *Separation of Functions and the NLRB*, 7 U. of Chi. L. Rev. 328, 329, n. 6 (1940). See also, S. Rep. No. 1516, 81st Cong., 2d Sess., pp. 3-4.

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[12]H. Rep. No. 3109, 76th Cong., 3d Sess., p. 149. See also, H. Rep. No. 1852, 81st Cong., 2d Sess., p. 21.

cess generally, specific plans were devised for coping with the Wagner Act's manifestation of this alleged vice.[13] For example, as petitioner notes (Br., pp. 26-27), the Smith Committee of the House of Representatives, in 1940, recommended that the prosecutory functions of the Board be transferred to an Administrator, unconnected with the Board and appointed by the President, subject to confirmation by the Senate.[14]

With the enactment of the Administrative Procedure Act in 1946, the Board, upon analysis of the separation of functions provisions of Section 5 (c) of that Act (n. 10, p. 9, *supra*), concluded:[15]

> .... we think that the Board's customary structure meets the requirements. The Board's Trial Examining division is a separate autonomous unit of the Board, under the direction and supervision of a Chief Trial Examiner who is responsible directly to the Board and to no one else. The prosecution and investigation of cases, on the other hand, are handled by the Regional Offices almost entirely on an autonomous and independent basis. Where advice as to prosecutions is desired, the Board has established a Committee, consisting of the Director of the Field Division and the Associate General Counsel in charge of field legal operations, to consider and give such advice. None of these persons participates or assists the Board in the decision of cases. Nor do they have any supervision

[13]See Cushman, *The Independent Regulatory Commissions* (Oxford, 1941), pp. 714-715.

[14]H. Rep. No. 1902, Part 1, 76th Cong., 3d Sess., pp. 89-90.

[15]Findling, *NLRB Procedures: Effects of the Administrative Procedure Act*, 33 A. B. A. J. 14, 17 (January, 1947).

> or control over personel who do. The Board is assisted in the decision of cases by the Review Section, which is headed by an Assistant General Counsel, and whose staff has no other functions.

The 80th Congress, which was considering amendments to alleviate other Wagner Act problems, decided, however, that, insofar as the Board was concerned, the Administrative Procedure Act had not adequately eliminated the danger of Board prejudgment of unfair labor practice cases.[16]

Thus H. R. 3020, as passed by the House of Representatives, undertook to deal with this matter in a manner similar to that proposed by the Smith Committee — i.e., by taking away from the Board power over the investigation of charges and issuance of complaints, and vesting it in an Administrator, wholly outside of the agency.[17] The Administrator was also given the function of seeking enforcement of the Board's orders in the courts, and the function of handling preliminary phases of representation cases. In the Conference Committee, however, the provision for a separate Administrator was rejected, and in its place emerged the present Section 3 (d).[18] Unlike the House version, which in effect created separate agencies, Section 3 (d) sought to achieve separation of functions

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[16]See *Hearings before the House Committee on Education and Labor on Amendments to the NLRA*, 80th Cong., 1st Sess., pp. 230, 2344, 2530-2531, 2722, 2729. See also, H. Rep. No. 1852, 81st Cong., 2d Sess., pp. 28-29; S. Rep. No. 1516, 81st Cong., 2d Sess., p. 7.

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[17]H. R. 3020, 80th Cong., 1st Sess., Sec. 4., set forth in *Legislative History of the Labor Management Relations Act 1947* (Gov't Print. Off., 1948), Vol. I, pp. 173-175. See also, H. Rep. No. 245, 80th Cong., 1st Sess., pp. 6, 26, set forth *Id.*, at pp. 297, 317.

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[18]See H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 36-37, set forth in *Legislative History, op. cit*, pp. 540-541. Neither S.

"within the framework of the existing agency".[19] A "General Counsel *of the Board* who shall be appointed by the President" was vested with "final authority, *on behalf of the Board*, in respect of the investigation of charges and issuance of complaints under Section 10" (Italics added). *Act as amended*, Section 3(d). The function of seeking enforcement of the Board's orders in the courts, and the handling of representation cases remained, as before, with the Board.[20]

B. The effect of Section 3 (d) in the light of the problem at which it was directed, i. e., Board prejudgment of unfair labor practice cases.

In the light of this background, it is apparent that Section 3 (d) was directed against the danger of Board *prejudgment* of a case which it would ultimately decide, by reason of having, in some degree, participated in the determination to issue a complaint therein. Cf. S. Rep. No. 1516, 81st Cong., 2d Sess., pp. 3-7. The provision sought to accomplish such objective by reassigning the function of determining, based on preliminary investigation of the charge, the propriety of issuing a complaint. That function was transferred, from an "anonymous committee of subordinate employees" controlled by the Board, to the General Counsel. To insure that the General Counsel, in the discharge of this function, would be divorced from the Board, it was provided that he be appointed by the President and that his determination respecting the issuance or non-issuance of a complaint be

1126 as reported by the Senate Labor Committee, nor H. R. 3020 as passed by the Senate, contained any provision for isolating the Board from the investigation of charges and the issuance of complaints. *Legislative History*, pp. 99-157, 226-291, 414-416.

[19] 93 Cong. Rec. 6599 (June 5, 1947).

[20] See *Haleston* brief, pp. 21-23; 38-41.

"final".[21]

Under the Wagner Act, the function exercised by the Board-established committee, "consisting of the Director of the Field Division and the Associate General Counsel in charge of field legal operations" (*supra*, p. 11), was confined to the area of *probable cause.* The Committee determined, based upon the results of the preliminary investigation of the charge, whether there was probable cause to believe that unfair labor practices affecting commerce had occurred (items (1) and (2), *supra*, p. 6). The Committee also determined whether issuance of a complaint would effectuate the policies of the Act (item (3), *supra*, p. 6). But this policy determination, too, was not an adjudication of the question; it merely constituted the prosecutor's finding that there was *probable cause* to believe that the institution of proceedings would further the objectives of the Act. The adjudication of this question, like that of the question whether unfair labor practices had been committed, was made by the Board, after a formal record had been compiled. See *Brown & Root, Inc.*, 51 N. L. R. B. 820.

Accordingly, by transferring the Committee's function to the General Counsel, Section 3 (d), although empowering the General Counsel to make a policy determination as to whether the case is "worthy of prosecution", does not authorize him to *adjudicate* this question to the exclusion of the Board, but only to make the same type of prosecutor's finding which petitioner concedes (*supra*, pp. 6-7) he is limited to on the other questions in the

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[21]See Senator Taft's statement, quoted in *Haleston* brief, pp. 26-27. Cf. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 37: "By this provision [Section 3 (d)] responsibility for what takes place in the *Board's regional offices* is centralized in one individual who is ultimately responsible to the President and Congress" (emphasis added).

case — i.e., *a finding of probable cause.* The General Counsel's findings of probable cause — both on the question of policy and on the question of whether unfair labor practices have been committed — are "final" and unreviewable by the Board (see pp. 19-25, *infra*). But, when the prosecution phase of the case has been completed — a point which marks the end of the General Counsel's authority — and the case is before the Board for decision, the *preliminary* findings on which institution of the proceeding was predicated do not foreclose the Board from adjudicating the *ultimate* validity of each such finding, including that on policy.[22]

This analysis of the effect of Section 3 (d) is conclusively affirmed by the statements of Senator Taft, made both before and after the Wagner Act was amended.[23] For example, he emphasized that the General Counsel's decision "will be subject to the judicial decision of the Board". Senator Taft, moreover, left no doubt that he meant this observation to be applicable to the General Counsel's decision on policy questions as well as on the merits, for he added, with reference to the issue presented here, that: "Gradually these differences between the Board and the General Counsel [on the policy of asserting jurisdiction over local enterprises] will be resolved by the Board, and of course the Board has the final word".[24]

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[22]Indeed, if these preliminary findings did have such force, they would in effect prejudge the ultimate decision, the very evil which Congress, by Section 3 (d), sought to avoid. Cf. *Haleston* brief, pp. 31-32.

[23]Quoted in *Haleston* brief, pp. 27-29.

[24]The portions of legislative history cited by petitioner (Br., pp. 18-26) are entirely consistent with our view of the purpose and effect of Section 3 (d). They merely disclose, as we have recognized, that Congress intended to vest the General Counsel, free from any direction or control by the Board, with the power

In addition, the budgetary structure of the agency necessarily requires that the Board, rather than the General Counsel, have the power ultimately to decide whether, as a matter of policy, jurisdiction should be asserted over a particular enterprise. Under the Act, final responsibility

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to determine all questions incidental to the issuance of complaints. There is no indication of any intention that the General Counsel, by exercising his unreviewable discretion to prosecute, would limit the Board's decisional process. See also, n. 35, p. 24, *infra*.

The fact that, as passed by the House H. R. 3020, which provided for an independent Administrator, "contained no statement with the respect to the finality of the Administrator's action while the Conference Bill gave the General Counsel 'final authority' " (Br., pp. 27-28), weakens, rather than strengthens, petitioner's position. Since, in petitioner's view, the fact that Section 3 (d) gives the General Counsel "final authority" in respect of complaints precludes the Board from dismissing for policy reasons, the absence of this phrase in H. R. 3020 means that, under the House Bill, the Board would have retained its Wagner Act power to dismiss complaints for policy reasons. Since the Conference Bill, which was finally enacted, was a compromise between H. R. 3020 as passed by the House and Senate action which made no provision for separation of functions (see n. 18, p. 12, *supra*), it is hardly likely that it went further than did H. R. 3020 in limiting the Board's decisional process.

Nor does the Senate's rejection of Reorganization Plan No. 12, which would have abolished the independent office of General Counsel, establish, as petitioner contends (Br. pp. 51-53), that Congress intended the General Counsel's prosecution policy judgment to preclude the Board from itself deciding whether an assertion of jurisdiction would effectuate the policies of the Act. Reorganization Plan No. 12 was opposed, not because it would have empowered the Board to decline to assert jurisdiction for policy reasons, but because it would allegedly have restored the Board to the position where its adjudicatory decision might be tainted by its preliminary findings in respect of issuance of the complaint. See H. Rep. No. 1852, 81st Cong., 2d Sess., pp. 21-22, 27-29; S. Rep. No. 1516, 81st Cong., 2d Sess., pp. 3-7; 96 Cong. Rec. 6962 (May 11, 1950). Cf. the statements of Senator Taft, one of the leading opponents of Plan 12, set forth in the text above, p. 15.

for estimating the agency's fiscal needs, and for determining how the money appropriated to the agency by Congress is to be utilized, is vested in the Board, not in the General Counsel. Thus Section 3 (c) of the Act provides that:

> *The Board* shall at the close of each fiscal year make a report in writing to Congress and the President stating in detail .... the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and *an account of all moneys it has disbursed.* (Italics added).

Section 4 (a) provides that:

> *The Board* shall appoint an executive secretary, and such attorneys, examiners, and regional directors and such other employees as it may from time to time find necessary (emphasis added).

And Section 4 (b) provides that:

> All of the expenses *of the Board,* including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board *under its orders,* shall be allowed and paid on the presentation of itemized vouchers therefor *approved by the Board* or by any individual it designates for that purpose (emphasis added).[25]

The Act confers no comparable duties or authority upon

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[25]The term "Board", as used in these provisions, means the five members of the National Labor Relations Board. *Act,* Sections 2 (10), 3 (a). See *Evans* v. *ITU*, 76 F. Supp. 881, 887-888 (S. D. Ind.); *N. L. R. B.* v. *ITU*, 76 F. Supp. 895, 898-899 (S. D. N. Y.).

the "General Counsel of the Board."[26]

Furthermore, Congress, in appropriating money for the administration of the Act, does not appropriate one sum for the office of General Counsel and another for the Board, but a total amount for the "National Labor Relations Board."[27] This total amount is based upon a fiscal year budget estimate submitted to the Bureau of the Budget by the Chairman of the Board on behalf of the entire agency.[28] Similarly, communications from the Bureau of Budget, with respect to such matters as budget policy and personnel ceilings for the agency, are addressed to the Chairman of the Board.[29]

As we have shown in the *Haleston* brief (pp. 43-49), the decision as to whether assertion of jurisdiction over a particular enterprise would effectuate the policies of the Act involves a judgment as to what constitutes the best

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[26]Cf. Section 4 of H. R. 3020, as passed by the House. *Legislative History of the Labor Management Relations Act 1947* (Gov't Print. Off., 1948), Vol. I, pp. 173-175. See also, S. 3339, 81st Cong. 2d Sess, Secs. 4 (a), (b) and (c), set forth in *Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248,* 81st Cong., 2d Sess., pp. 38-39.

[27]See *Third Deficiency Appropriation Act, 1949,* Public Law 343, set forth in U. S. Code Congressional Service, Vol. I, pp. 755-760.

[28]A copy of the Chairman's covering letter for the 1951 budget estimate is reproduced in the Appendix, *infra,* pp. 39-42.

[29]That the Board, rather than the General Counsel, controls the budget, is also shown by the fact that Reorganization Plan No. 12, which, *inter alia,* would have transferred the administrative functions of the agency to the Chairman of the Board, contained the following proviso: "There are hereby *reserved to the Board its functions* with respect to budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes" (emphasis added). *Reorganization Plan No. 12,* Sec. 1 (b) (4), set forth in S. Rep. No. 1516, 81st Cong., 2d Sess., p. 16.

allocation of funds and personnel. See also, H. Rep. No. 1852, 81st Cong., 2d Sess., p. 10. Since the Board, and not the General Counsel, controls the factors which enter into this policy decision, the Board, unless its budgetary control were to be rendered illusory, must have the last word on whether the exercise of jurisdiction is warranted. In short if the issuance of a complaint by the General Counsel did more than determine this question preliminarily — i.e., precluded the Board from making an independent evaluation of the relevant factors — the "final authority" of the Board, rather than of the General Counsel, would be *pro tanto* nullified. Conversely, Board dismissal of a complaint for the policy reason of remote effect on commerce no more intrudes upon the General Counsel's selection of cases for prosecution than if the Board were to limit outright the amount of funds expended by the General Counsel — which it could clearly do in the exercise of its absolute control over the allocation of the agency's appropriation. The General Counsel's discretion is thus not unlimited. Moreover, as Senator Taft pointed out, should the Board "make some declaration of policy", the General Counsel must follow that policy (see *Haleston* brief, p. 29; cf. *Id.*, p. 47).

To sum up: The purpose of Section 3 (d) was to avoid the danger of Board *prejudgment* of unfair labor practice cases. It achieves this objective by vesting the General Counsel with the sole power to determine all questions of *probable cause* incidental to the issuance of a complaint, thereby insulating the Board from the prosecutory stage of the case. Section 3 (d), however, does not affect the decisional stage of the case. After a complaint has issued and a hearing has been held, any action the Board may thereafter take, either as a matter of policy or on the merits, is an exercise of adjudicatory power, to

which the *preliminary findings* instituting the proceeding are ultimately subjected.

C. Restriction of the General Counsel's authority to probable cause findings does not strip him of power to make "final" determinations within the meaning of Section 3 (d)

Petitioner contends (Br., pp. 12-16) that the phrase "final authority," contained in Section 3 (d), means without review by the Board. It argues that since, in determining whether to issue a complaint, the General Counsel must conclude that, as a matter of policy, the case is worthy of prosecution, a Board decision dismissing the complaint on policy grounds is in effect a review of the General Counsel's action, destroying its finality in contravention of Section 3 (d) (Br., pp. 16, 28-30).

Petitioner concedes, however, that a Board decision which is contrary to the General Counsel's analysis of the merits does not constitute a review of his action and hence is not inconsistent with his "final" authority (*supra*, pp. 6-7). We submit that there is no valid basis for this distinction.

The Board's dismissal of a complaint issued and prosecuted by the General Counsel — whether such dismissal be on the merits or on policy grounds — does not review the findings which Section 3 (d) authorizes him alone to make. As shown (*supra*, pp. 13-19), Section 3(d) merely empowers the General Counsel to make findings of probable cause — the nature of his findings on policy issues being the same as those on the merits. This area the Board does not enter as a reviewing agent.

When the case reaches the Board for decision, the Board is not concerned with the question of whether there is probable cause to believe that the law has been violated — the issue determined by the General Counsel — but with the entirely different question of whether such violation has *actually* occurred. Similarly the Board is not con-

cerned with the question of whether the case is *worthy of prosecution;* i.e., the policy judgment of the prosecutor, based upon his preliminary investigation of the charge and his estimate as to the importance of the case in relation to the over-all demand on the agency's limited budget and personnel. Rather, the Board decides the further question of whether the case is *worthy of adjudication* — a quasi-judicial decision based upon the entire record and complete knowledge as to the agency's available resources.

The validity of this analysis is borne out by reference to the relation between the Board and a District Court which has issued an injunction under Section 10 (1) of the Act. Under this provision the General Counsel or his agent is directed in the case of certain types of unfair labor practice charges to apply to the District Court for temporary injunctive relief should preliminary investigation disclose "reasonable cause to believe such charge is true and that a complaint should issue."[30] The District Court, in determining whether to issue an injunction, *reviews* the General Counsel's findings of probable cause — both on the merits and on policy — but makes no attempt to decide whether they are ultimately valid. Resolution of this further question, which "must rest upon a full hearing and a measure of proof and inquiry extending beyond the standard of probability" (*Evans* v. *ITU*, 76 F. Supp. 881, 885 (S. D. Ind.)), is for the Board when the case subsequently reaches it for adjudication.[31] As a corollary,

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[30]By delegation from the Board, the General Counsel may also apply for temporary injunctive relief after a complaint has been issued, as provided in Section 10 (j). See 13 F. R. 654-655; 15 F. R. 1088-1090.

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[31]See *LeBaron* v. *Los Angeles Bldg. & Construction Trades Council*, 84 F. Supp. 629, 635-636 (S. D. Cal.); *Brown* v. *Roofers & Waterproofers Union*, 86 F. Supp. 50, 52-54 (N. D. Cal.); *LeBaron* v. *Kern County Farm Labor Union*, 80 F. Supp. 151, 154,

the District Court's affirmance of the General Counsel's findings of probable cause, like the General Counsel's findings where no 10 (1) injunction has been obtained, is in no way relevant or material to the Board's adjudicatory function of arriving at an ultimate decision. The Board is not concerned with matters of probable cause — the subject dealt with by the General Counsel and the District Court — but with the further and unrelated matters of whether a violation of law has *actually* occurred and whether adjudication of the controversy would *in fact* effectuate the purposes of the statute.[32]

It should also be emphasized that because the Board's adjudication results in a dismissal of the General Counsel's process, it does not follow, as petitioner itself concedes with respect to disposition on the merits, that the Board has reviewed the General Counsel's action in instituting the proceeding. Just as the return of an indictment by a grand jury is "conclusive on the issue of probable cause" (*Ewing* v. *Mytinger & Caselberry*, 70 S. Ct. 870, 873), even though the trial court may subsequently determine that the accused is not guilty, the General Counsel, in issuing a complaint, conclusively determines all issues of probable cause incidental thereto. The Board's subsequent decision dismissing the complaint — either on the merits or on policy grounds — does not constitute a review of the General Counsel's action any

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153 (S. D. Cal.); *Douds* v. *Local 294*, 75 F. Supp. 414, 418 (N. D. N. Y.). Cf. *Brown* v. *Retail Shoe & Textile Salesmen's Union*, 26 LRRM 2225 (N. D. Cal.), March 6, 1950.

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[32]Compare *Shore* v. *Bldg. & Construction Trades Council*, 173 F. 2d 678 (C. A. 3) with *Bldg. & Construction Trades Council (Petredis & Fryer)*, 85 N. L. R. B. 241. Compare *Bott* v. *Glaziers' Union*, 23 LRRM 2181 (N. D. Ill., November 19, 1948) with *Glaziers' Union (Joliet Contractors Ass'n)*, 90 N. L. R. B. No. 93, 26 LRRM 1245, June 26, 1950. See also, *Denver Bldg. & Construction Trades Council*, 82 N. L. R. B. 93.

more than does the trial court's determination that the accused was innocent constitute a review of the grand jury's finding of probable guilt.

In sum therefore, Board dismissal of a complaint for policy reasons, like a dismissal on the merits, does not strip the General Counsel of the power to make "final" determinations within the meaning of Section 3 (d). The General Counsel, in determining that a complaint should issue, makes findings of probable cause. These findings are neither reviewed, nor in any other manner considered, by the Board when it subsequently performs its adjudicatory function. The Board is concerned, not with probability but with actuality.[33]

Moreover, as Mr. Justice (then Attorney General) Jackson has observed:[34] "The prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous ...... he can choose his defendants ...." So the General Counsel, by virtue of Section 3 (d), has the absolute discretion to determine those cases in which formal pro-

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[33]The *Bryan* and related cases cited by petitioner (Br., pp. 12-16) present the situation where the head of the department sought to redetermine the *identical question* decided by one of its bureaus. They are therefore inapplicable to the situation here, where the Board is concerned with questions *entirely different* from those determined by the General Counsel.

Petitioner's reliance on the *Lincourt* and *Parsons* cases (Br., pp. 11-12) is likewise misplaced. The question in these cases was whether the Board could review the General Counsel's *refusal to issue* a complaint, and not, as here, whether the *issuance of a complaint* by the General Counsel limits the Board's decisional process. The Board has always recognized that it has no authority to review the General Counsel's refusal to issue a complaint—see discussion in text, pp. 23-25, *infra*.

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[34]Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc'y 18-19 (1940). See also Landis, *The Administrative Process* (Yale, 1938), pp. 110-111; Davis, *Administrative Powers*, 63 Harv. L. Rev. 193, 218-219.

ceedings will be instituted. The "Board cannot itself issue a complaint; it cannot compel the General Counsel either to issue or refrain from issuing one; it cannot review his action in refusing to issue one" (R. 55).[35] Indeed, this is so because the General Counsel's determination of probable cause is final and conclusive and the Board's quasi-judicial functions do not come into play unless the General Counsel has made a preliminary finding of probable cause.

Not only does the General Counsel alone control the choice (but not the disposition) of unfair labor practice cases which come before the Board, but his final and unreviewable authority to determine whether an unfair labor practice proceeding should be instituted can limit even the functions reserved to the Board in representation matters. As pointed out by Chairman Herzog:[36]

> the statute empowers the Board alone to certify the bargaining representative of employees in an appropriate unit, upon petition of the employees or their employer. The Board's certificate, issued after hearing and secret-ballot election, is not a binding order to the employer to bargain collectively with the certified representative. The em-

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[35]It was in this context that opponents of Section 3 (d) spoke of the General Counsel's power "to control the policy for the enforcement of the Act", and "to determine when a complaint shall be acted upon by the Board" (Br., pp. 24-26). That is, they meant that there was no control over the cases which the General Counsel chose, in his unfettered discretion, to *leave out;* not that, once a case was brought, the Board was barred from dismissing for policy reasons. See *Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248,* 81st Cong., 1st Sess., p. 119.

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[36]*Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248,* 81st Cong., 2d Sess., p. 122.

> ployer may challenge the Board's certificate by refusing to bargain. But the Board is powerless to enforce its certificate unless and until an unfair labor practice proceeding is instituted and prosecuted by the General Counsel. If he should refuse for any reason to initiate such proceeding, the certificate would become worthless. And, of course, the policy of Congress to promote industrial peace by fostering collective bargaining would to that extent be obstructed . . .

Likewise, Section 9 (c) (3) of the Act provides that economic strikers who have been replaced (as distinguished from workers whose strike was caused or prolonged by employer unfair labor practices) shall not be eligible to vote in Board representation elections. Unless the General Counsel issues a complaint against the employer (and it is sustained), the Board is precluded in a representation proceeding from making a finding that the strike was caused or prolonged by an unfair labor practice; it must presume and hold that the strikers have lost their eligibility to vote.[37] "Thus the General Counsel is able to determine the outcome of an election conducted during a strike." S. Rep. No. 99, 81st Cong., 1st Sess., p. 40.

POINT II.

Section 10 of the Act confers upon the Board discretionary authority to dismiss complaints for policy reasons, including remote effect on commerce

Petitioner further contends (Br., pp. 31-49) that, apart from the fact that discretionary authority in the Board to decline jurisdiction for policy reasons is incompatible with Section 3 (d), there is nothing in either the Act or the inherent power of an administrative agency which

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[37]See cases cited *Haleston brief*, p. 25, n. 31.

confers such discretion upon the Board. We shall demonstrate that this contention is likewise without merit.

A. Section 10 (c) does not preclude the Board from dismissing complaints for policy reasons

Petitioner emphasizes (Br., pp. 32-34) that Section 10 (c) of the Act affords the Board but two alternatives — "if it believes that unfair labor practices are committed, it 'shall' issue a cease and desist order; if it is of the opinion that unfair labor practices were not committed, it 'shall' dismiss the complaint." Section 10 (c), petitioner urges, thus limits the Board's power to dismiss a complaint to the situation where it finds that the conduct alleged in the complaint does not constitute an unfair labor practice affecting commerce.[38]

Borrowing Mr. Justice Frankfurter's language (*Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 191), "this is a bit of verbal logic from which the meaning of things has evaporated."

1. The words "shall" in Section 10 (c) do not have the mandatory and limiting effect ascribed to them by petitioner. The Senate Committee, in commenting upon the Board's complaint procedure under the Wagner Act, stated that:[39]

> After [unfair labor practice] hearings, the Board . . . *may* issue orders requiring the person complained of to cease and desist and to take such affirmative action . . ., as may be necessary to ef-

[38]Petitioner adds (Br., p. 33) that, by its terms, Section 10 (c) confers discretion upon the Board *only* in respect to fashioning an *affirmative* remedy.

[39]S. Rep. No. 573, 74th Cong., 1st Sess., p. 15. Section 10 (c) of the amended Act, in all respects material here, is identical to Section 10 (c) of the Wagner Act.

> fectuate the polices of the bill . . . . (Italics added).

Similarly, the House Committee expressed the view that the issuance of an order under Section 10 (c) was discretionary with the Board:[40]

> The form of *injunctive and affirmative order* is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by the law declared to be detrimental to the public weal.

The legislative history of Section 10 (c) therefore recognizes that, despite the issuance of a complaint and a finding that unfair labor practices affecting commerce have occurred, the Board has discretionary authority to withhold a cease and desist order, as well as an affirmative remedy, if, in its judgment, such course would best effectuate the policies of the Act.

The existence of such discretionary authority is also shown by the Board's holding in *Marshall and Bruce Co.*, 75 NLRB 90, 95-97, which was approved by the Court of Appeals for the Second Circuit in *NLRB* v. *Brozen*, 166 F. 2d 812, 813-814. There, the Board, because of the policy evidenced by Sections 9 (f), (g), and (h) of the amended Act, conditioned its order, containing the usual cease and desist and affirmative remedies for a finding of unlawful refusal to bargain, upon the union's compliance with those provisions within 30 days. This result was not required as a matter of law, for the unfair labor practice had been committed, and the Board proceeding instituted, prior to the enactment of Sections 9 (f), (g), (h).[41] The

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[40]H. Rep. No. 1147, 74th Cong., 1st Sess., p. 24.

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[41]See *N.L.R.B.* v. *Clark*, 176 F. 2d 341, 343 (C.A. 3); *N.L.R.B.* v. *Fulton Bag & Cotton Mills*, 180 F. 2d 68, 71-72 (C.A. 10).

imposition of a condition on issuance of the cease and desist portion of the order can thus be explained only on the theory that Section 10 (c) vests the Board with discretionary authority to withhold negative, as well as affirmative relief, if it finds that the policies of the Act so require.[42]

Equally relevant is this Court's recent decision in *N. L. R. B.* v. *Flotill Products, Inc.,* 180 F. 2d 441. There, the Board, having found that Flotill had committed unfair labor practices by granting exclusive recognition and a closed shop to the AFL at a time when its representative status was being challenged by the CIO, ordered Flotill "to cease and desist from these unfair labor practices, to cease giving effect to the closed-shop contract, [and] to withhold exclusive recognition from the AFL unless and until" it had been certified by the Board (180 F. 2d, at 443). This Court, without determining whether Flotill's conduct was violative of the Act,[43] concluded that, in view of subsequent events, the Board's order would tend to thwart rather than effectuate the purposes of the Act. The Court therefore set aside the Board's order in its entirety — the cease and desist portions as well as the affirmative portions. If Section 10 (c), as petitioner contends, had made the issuance of a cease and desist order mandatory upon finding that unfair labor practices were committed, this would have limited the Court in the exercise of its function under Section 10 (e) no less than it limited the Board in the first instance. Accordingly, the Court could not have declined to enforce the cease and desist portions of the Flotill order unless it had first reversed the Board's unfair labor practice finding.

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[42]See also, *Solvay Process Co.* v. *N. L. R. B.*, 117 F. 2d 83, 86 (C. A. 5), cert. den., 313 U. S. 596: "By Section 10 (c) of the Act . . . the Board may exercise some discretion in determining whether affirmative or negative relief, or both, should be granted."

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[43]Cf. *N. L. R. B.* v. *Hume Co.*, 180 F. 2d 445, 447 (C. A. 9).

2. There can thus be no question that, had the Board determined here that unfair labor practices affecting commerce existed, it would nevertheless have been empowered by Section 10 (c) to withhold both negative and affirmative relief for policy reasons, and consequently to dismiss the complaint. Moreover, even had an order been issued, the Board, under the discretionary authority conferred by Section 10 (e), could in effect have achieved the same result by declining to seek enforcement of the order.[44] Under these circumstances, it is reasonable to assume that, should the policy considerations which would bar relief become apparent, as here, at the threshold of the case, the Board would possess the power to dismiss the complaint on policy grounds, without first having to go through the time and expense of a futile decision on the merits.

The Act fulfills this reasonable expectation. As the Supreme Court in the *Indiana and Michigan* case (318 U. S. 9, 19) and the lower courts in other cases (*Haleston* brief, pp. 12-14) have held, the Board, under the Wagner Act, possessed discretionary authority to dismiss a complaint for policy reasons, *without* determining the existence of unfair labor practices. This power stemmed, not from the Board's authority to initiate prosecution (Section 10 (b)), but from the fact that Congress imposed on the Board an overriding obligation to determine in its quasi-judicial capacity, before exercising any of the powers enumerated in Section 10, that "the unfair labor practice complained of interferes so substantially with the public rights created in Section 7 as to require its restraint in the public interest." *N. L. R. B. v. Newark Morning Ledger Co.*, 120 F. 2d 262, 268 (C. A. 3), cert. den., 314 U. S. 693.[45] This obligation was manifested by

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[44]See *Haleston* brief (pp. 10-11, 22, 41).

[45]See also, *N. L. R. B. v. Walt Disney Products,* 146 F. 2d 44, 48 (C. A. 9), cert. den., 324 U. S. 877.

the permissive language of Section 10 (a) of the Wagner Act, which read: "The Board is *empowered*, as hereinafter provided, to prevent any person from engaging in any unfair labor practice" (emphasis added).

The phrase "as hereinafter provided," together with the procedures enumerated in the succeeding sub-sections of Section 10, were not, as petitioner contends (Br., pp. 32-34), incompatible with the existence of such discretionary power. The phrase and the procedures meant that, should the Board conclude that the public interest required it to prevent the unfair labor practice in issue, it must do so by means of the procedure spelled out in the statute. They did not, however, require that the word "empowered" in Section 10 (a) be read as "directed," so that the Board was compelled in every case to follow such procedure blindly to completion, without regard to the effect thereof on the policies of the statute.

In other words, Section 10 (c) of the Wagner Act merely described the manner in which the Board would exercise its quasi-judicial function of determining whether unfair labor practices had been committed and how they should be cured — once it reached the merits. But Section 10 (c) did not compel the Board to make such determination if it appeared, from the record before it, that there were valid policy reasons for declining to pass on the merits. The Board's overriding obligation, as expressed in the permissive language of Section 10 (a), carried forward to the adjudicatory stage the power, under these circumstances, to dispose of the case on the policy grounds.

The amendments to the Wagner Act have altered neither the relevant language of Section 10 (a), nor the Board's obligation to give effect to the public interest (see *Haleston* brief, pp. 21-23). Accordingly, the grant of control over the issuance of complaints to the General Counsel, although precluding the Board from determining

whether the policies of the Act warrant *initiation* of the unfair labor practice procedure enumerated in Section 10, does not deprive the Board of power to give effect to its public responsibilities when the case reaches the *subsequent stage* of adjudication. At that stage, as the recent decision in the *Electrical Workers'* case indicates (*Haleston* brief, pp. 41-43), the Board still possesses discretionary authority to dismiss complaints for policy reasons without deciding whether unfair labor practices have been committed.[46]

B. The Board's power to decline jurisdiction for policy reasons is consistent with its nature as a quasi-judicial administrative agency

The Board's power to decline jurisdiction for policy reasons, contrary to petitioner's suggestion (Br., pp. 44-49), is consistent with the intention of Congress to give it only quasi-judicial functions in unfair labor practice cases. As

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[46]Petitioner errs in asserting (Br., pp. 34-35) that, even in representation cases under Section 9 (c), the Board lacks discretionary authority to dismiss a petition for policy reasons. The fact that Congress, in amending Section 9 (c), changed "may investigate" to "shall investigate" is irrelevant. Granted that the Board now *must* investigate the petition, it does not follow that it lacks discretion, *after* such investigation, to dismiss the petition for policy reasons. Under the Wagner Act, the Board, in addition to remote effect on commerce, dismissed representation petitions for a number of other policy reasons — e. g., insufficient showing of interest; outstanding collective bargaining contract which stabilized bargaining relations. See *N. L. R. B., Thirteenth Annual Report* (Gov't Print. Off., 1949), pp. 27-32. Cf. *I. O. B.* v. *Los Angeles Brewing Co.,* 26 LRRM 2401, 2406 (C. A. 9), June 21, 1950. Since the legislative history of the amended Act affirmatively discloses that Congress did not intend to deprive the Board of discretion to dismiss petitions for the latter reasons (S. Rep. No. 105, 80th Cong., 1st Sess., p. 25), the presumption is that discretionary authority to dismiss petitions because of remote effect on commerce still exists. Indeed, the General Counsel concedes that, under the amended Act, the Board has discretionary authority to dismiss representation petitions on this ground (R. 62). Cf. *Haleston* brief, pp. 37-41.

we have shown in the *Haleston* brief (pp. 35-36), an essential element of the quasi-judicial function of an administrative agency is discretionary authority to effectuate the policy of the underlying statute. This is also evidenced by the holding of the Supreme Court in *FTC* v. *Klesner*, 280 U. S. 19.

The question before the Court was the propriety of the Commission's issuance of a complaint under Section 5 of the Federal Trade Commission Act. The Court, after emphasizing that Section 5 proceedings were discretionary with the Commission and to be instituted only if the public interest required, found that the unfair competition alleged in the complaint arose out of a controversy essentially private in nature. Accordingly, the Court concluded that the proceeding was not in the public interest, and that the Commission erred in failing to dismiss the complaint as soon as the record revealed the private character of the controversy. In the words of the Court (280 U. S., at 30):

> The specific facts established may show . . . that the proceeding which [the Commission] authorized is not in the public interest, within the meaning of the Act. If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint . . .
>
> The undisputed facts, established before the Commission, at the hearings on the complaint, showed affirmatively the private character of the controversy. It then became clear (if it was not so earlier) that the proceeding was not one in the interest of the public; and that the resolution authorizing the complaint had been improvidently entered . . .

If discretionary authority in the Federal Trade Commission to dismiss a complaint for policy reasons is thus consistent with its quasi-judicial function of determining whether unfair methods of competition have occurred, the existence of similar authority in the Board is likewise consistent with its quasi-judicial functions under the National Labor Relations Act. Especially is this so, in view of the fact that Congress specifically intended that the Board's unfair labor practice function under the National Labor Relations Act would be analogous to that of the Commission under Section 5 of the Federal Trade Commission Act. See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 269.

Moreover, even had Congress, by the amendments to the Act, converted the Board into a court,[47] this circumstance alone would not deny to it discretionary authority to dismiss proceedings for policy reasons. In sustaining, pursuant to the doctrine of *forum non conveniens,* the lower court's dismissal of a tort action over which it had diversity jurisdiction, the Supreme Court observed that:[48]

> This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances. As formulated by Mr. Justice Brandeis, the rule is:
> "Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts admin-

[47]Actually Congress did not do that. It retained the Board's status as an administrative agency, but left it, in unfair labor practice cases, with only quasi-judicial functions. See *Haleston* brief, pp. 33-34.

[48]*Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 504.

> istering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." *Canada Malting Co., Ltd.*, v. *Paterson Steamships, Ltd.*, 285 U. S. 413, 422-23.[49]

As the Court added in *Meredith* v. *Winter Haven*, 320 U. S. 228, 234-235, courts may properly decline to assert jurisdiction where there is a "recognized public policy or defined principle guiding" its non-exercise. Since the policy set forth in Section 1 of the Act provides a standard for determining which cases to entertain and which to refuse, the Board, though it were only a court, would thus have discretionary authority to decline jurisdiction.

C. Dismissal of a complaint because of remote effect on commerce effectuates the policies of the Act no less than a dismissal for other policy reasons

Conceding *arguendo* that Section 10 empowers the Board to dismiss a complaint for policy reasons, petitioner then contends (Br., pp. 35-40, 54-55) that a dismissal for the reason of remote effect on commerce is not comprehended by such authority. A dismissal on this ground, as distinguished from a dismissal for the other policy reasons cited in the Board's decision (R. 59, n. 10; see also, *Haleston* brief, pp. 12-14), does not, petitioner asserts, effectuate the policies of the Act, but is merely "a refusal to consider whether the policy of the Act has been contra-

[49]Cf. *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105; *Slater* v. *Mexican Nat'l R. R.*, 194 U. S. 120; *Davis* v. *Farmers' Cooperative Equity Co.*, 262 U. S. 312; *Colorado* v. *Harbeck*, 232 N. Y. 71, 133 N. E. 357.

vened" (Br., p. 55).[50]

The short answer is that the last paragraph of Section 1 of the amended Act, which was identical under the Wagner Act, admonishes the Board to "eliminate the causes of certain *substantial* obstructions to the free flow of commerce" (emphasis added). This reference to "substantial obstructions" does not, as petitioner suggests (Br., pp. 38-39), refer "to labor disputes in general as being a substantial obstruction rather than . . . only to those individual labor disputes which are substantial obstructions." As the Supreme Court indicated in the *Consolidated Edison* case (see *Haleston* brief, pp. 16-17), the phrase means that, notwithstanding the existence of legal jurisdiction, the Board has an overriding obligation to determine, in each case where the employees are not themselves actually engaged in interstate commerce, that commerce is threatened in a substantial enough manner to justify the exercise of federal power. See also quotation from the *Newark Morning Ledger* case, p. 29, *supra*.

That such obligation exists is further demonstrated by *N. L. R. B.* v. *Gulf Public Service Co.*, 116 F. 2d 852 (C. A. 5). There, though holding that as a matter of law the Board had jurisdiction over a utility company with only

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[50]It is significant that the distinction which petioner seeks to draw — between a dismissal which is really a refusal to consider and a dismissal "directly connected with eradicating the results of unfair labor practices and affirmatively effectuating the policies of the Act" (Br., p. 54) — does not account for the *Indiana and Michigan* case, 318 U. S. 9, 19. A dismissal for the reason that the charging party has abused Board processes is not "directly connected with eradicating the results of unfair labor practices," and petitioner, troubled by this fact, explains that to give any relief in such situation "would actually fly in the face of the policy of the Act rather than effectuating such policy" (Br., pp. 54-55). As we shall show in the text, the same may be said for a dismissal on the ground of remote effect upon commerce.

local customers, the Court severely criticized the Board for exercising the full measure of its legal power (p. 854):

> . . . it is clear that the direct effect on interstate commerce of any labor disputes in this small . . . business would be comparatively infinitestimal, and that taking cognizance of such disputes, is drawing a fine bead at a gnat's heel, indeed, is almost a *reductio ad absurdum,* a running of the Act, its purposes and policies, into the ground. But the question before us is not one of the wise exercise of, but of the existence of, power . . .

The Court added that the "wise exercise" of this power was a matter of policy, which Congress had entrusted to the "discretion of the board" *(Ibid.)*[51]

Not only does dismissal of a complaint for the reason that the business involved has only a remote effect upon commerce give effect to the policy expressed in Section 1 of eliminating *substantial* obstructions to commerce, it affirmatively contributes to "removing causes of labor disputes or obstructions to commerce". By declining to entertain "local" cases, the Board frees the budget and personnel they would otherwise tie up, and makes them available for cases with a far greater impact on commerce (*Haleston* brief, pp. 43-45). Thus the latter threats to commerce, instead of becoming aggravated while awaiting Board attention, can be promptly headed off. Cf. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767, 776, 778.

Accordingly, where the Board, as here, has declined to exercise jurisdiction for the reason that the business involved has only a remote and insubstantial impact on

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[51]These views were recently restated in *N. L. R. B.* v. *Mid-Co Gasoline Co.*, 26 LRRM 2416, 2417 (C. A. 5), July 17, 1950. See also *Electrical Workers* case (*Haleston* brief, pp. 41-43).

stantial portion of such supplies from out-of-state. (R. 7-8.) During a comparable period, sales at the San Pedro store totalled $133,715.51, all of which, except for a minor quantity[2], were made to retail customers within the State of California (R. 9-10).

Upon these facts, the Trial Examiner concluded, contrary to the contention of respondent Union, that A-1 Photo was engaged in commerce within the meaning of the Act, and that therefore the Board, as a matter of law, had jurisdiction of the case (R. 10-11, 39). The Trial Examiner, however, noted that (R. 10-11):

> On occasion the Board has declined to exercise its jurisdiction over retail enterprises similar to that of the Employer, but such action has been based on policy considerations not properly within the province of the undersigned. The sole issue confronting the undersigned is whether the Board has jurisdiction over the case at bar, not whether, as a matter of public policy, it should assert it.

As to the merits, the Trial Examiner found that the Union and its Secretary, Haskell Tidwell, had refused to bargain collectively in violation of Section 8 (b) (3) of the Act, but had not committed any of the other unfair labor practices alleged in the complaint (R. 41). The Trial Examiner recommended an appropriate remedy for curing the violation of Section 8 (b) (3), and further recommended that the remainder of the complaint be dismissed (R. 41-43).

Both the Union and the General Counsel filed excep-

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[2]Merchandise valued at approximately $600 was delivered to customers outside of California, and merchandise valued at about $2400 was sold and delivered to installations of the United States Army and Navy (R. 10).

tions to the Trial Examiner's Intermediate Report (R. 45-50).

II. The Decision and Order of the Board sought to be reviewed

On May 13, 1949, the Board, after considering the entire record in the proceeding and the exceptions of the parties, entered an order dismissing the complaint in its entirety (R. 51-60).

The Board accepted the commerce facts found by the Trial Examiner and did not disturb his conclusion therefrom that, as a matter of law, A-1 Photo was engaged in commerce within the meaning of the Act and thus subject to the jurisdiction of the Board (R. 51-53). However, the Board added (R. 53):

> It is clear to us .... that the Employer's business is essentially local in nature and relatively small in size, and that interruption of his operations by a labor dispute could have only the most remote and insubstantial effect on commerce. Recently, we have dismissed several proceedings involving such enterprises, on the ground that the assertion of jurisdiction would not effectuate the purpose of the Act [footnote omitted]. The Respondents urge that we dismiss this proceeding for the same reason.

The Board then gave careful consideration to the General Counsel's contention that, "once he has issued a complaint in an unfair labor practice case, the Board Members have no authority to decline to assert jurisdiction on policy grounds, if jurisdiction in fact exists" (R. 53-58). The Board concluded, *inter alia,* that neither the provisions of Section 3 (d) of the amended Act nor the intention of Congress to effect a separation of the judicial and prosecuting functions of the agency deprived the

commerce, it has not abdicated its duty and refused to consider the policies of the Act. Rather, the Board, in an exercise of the discretion with which Congress has empowered it, has adopted a course which effectuates these policies just as much as a dismissal for any of the other reasons which petitioner assumes would be proper (Br., pp. 54-55).[52]

There remains petitioner's contention (Br., p. 39) that declination of jurisdiction because of remote effect on commerce cannot effectuate the policies of the Act because of the proviso to Section 10 (a). It is urged that this proviso, by providing for the cession of jurisdiction

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[52]The mandamus cases cited by petitioner (Br. pp. 45-49) are wholly inapposite. In the *ICC* cases, jurisdiction was declined, not because the ICC in the exercise of discretionary authority concluded that this best effectuated the policies of the statute, but because it concluded that the statute did not empower it to act at all. The Supreme Court decisions merely hold that there was statutory power, and that therefore the ICC's assumption that it lacked power was not a valid justification for refusing to assert jurisdiction. They do not hold that, where, as here, there is a valid reason for declining jurisdiction, an administrative agency, whose jurisdiction is discretionary, may not withhold its processes. The holding of the *Jacobsen* case (Br., pp. 40-42) is similarly limited (see *Haleston* brief, pp. 17-20).

For yet another reason, ICC precedents cannot be applied to the Board. The Interstate Commerce Act, unlike the Federal Trade Commission Act and the National Labor Relations Act, creates "private" rather than "public" rights. The interested person may file as of right a complaint before the ICC, and the carrier is required to answer. In other words, the jurisdiction of the ICC is not discretionary, as is that of the FTC and the Board. See *FTC* v. *Klesner*, 280 U. S. 19, 26; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 267-269; Jaffe, *Individual Right of Initiation*, 26 Iowa L. Rev. 485, 512-517.

The relevance of the state cases cited by petitioner is equally remote. They are concerned with arbitrary inaction, which is not the case here. Here, the Board did act. The Board's declination of jurisdiction involved the exercise of discretionary authority conferred by the Act, and effectuated the statutory objectives.

to the states in respect to predominately local industries, evidences a Congressional intention that the Board assert the full measure of its legal jurisdiction.

This contention must also fall. In the first place, petitioner concedes that the General Counsel, notwithstanding the proviso, has discretionary authority to decline to issue a complaint because of remote effect on commerce (Br., pp. 36, 39). If the proviso thus does not preclude the General Counsel from declining to assert the full measure of the Board's legal jurisdiction, neither does it limit the Board. Secondly, Congress, by indicating approval of the Board's policy of declining to assert jurisdiction over essentially local industries (see *Haleston* brief, n. 36, pp. 29-30; H. Rep. No. 1852, 81st Cong. 2d Sess., p. 10), has affirmatively shown that it did not intend the proviso to negate the overriding policy expressed in Section 1.

CONCLUSION

For the foregoing reasons, as well as for those given in the *Haleston* brief, it is respectfully submitted that the relief requested by petitioner be denied.

IDA KLAUS,
Solicitor,
NORTON J. COME,
Attorney,
National Labor Relations Board.

August, 1950.

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August, 1950.

APPENDIX

SUMMARY AND HIGHLIGHT STATEMENT
for the
NATIONAL LABOR RELATIONS BOARD

September 15, 1949

Honorable Frank Pace, Jr., Director
Bureau of the Budget
Washington 25, D. C.

Dear Sir:

Transmittted herewith is the 1951 fiscal year budget estimate for the National Labor Relations Board in the amount of $9,000,000.

The basis for estimation, the experience data, the basic assumptions, and the methods used in projecting financial requirements for fiscal year 1951, are detailed in the justification accompanying this memorandum.

The Agency's program, and therefore its financial needs for fiscal year 1951, are influenced in part by two major and novel factors:

1. A slight increase in the estimate of cases to be filed in fiscal year 1951 over recent experience must be anticipated. This increase is traceable to the fact that recently several large labor organizations have, for the first time, either already achieved compliance, or have indicated their intention to achieve compliance, with the registration and filing

requirement of Section 9 (f), (g), and (h) of the Labor Management Relations Act of 1947. The achievement of compliance enables these labor organizations once again to use the services of the National Labor Relations Board and is certain to affect the work load of the Agency for the remainder of fiscal year 1950 and through all of fiscal year 1951.

2. The combination of circumstances which has delayed for more than a year the recruitment of needed additional hearing examiners. Lack of sufficient hearing examiners has caused a serious backlog in one stage of case processing, has delayed the resolution of matters which require trial examiner hearings, and has effected all aspects of the Agency's operations during fiscal year 1949 and the early months of 1950. This projects additional work into 1951.

To arrive at its estimated financial needs for fiscal year 1951, the Agency first set as its objective achieving the desirable situation in which by the end of fiscal year 1951 there would be no abnormal delay at any stage in processing matters before it, so that its administrative machinery could operate with maximum speed. To attain this objective would require approximately $9,450,000, based upon conservative estimates of new case filings in fiscal year 1951, and a careful computation of personnel and other resources required to handle the anticipated work load in all parts of the Agency.

The Agency continues to believe that in the field of labor relations the importance of handling matters brought to it with the greatest possible speed consistent with due process is all important. Because of the two factors outlined above, this constitutes the exceptional circumstances

which we believe justifies a request for funds slightly larger than the Agency's probable 1950 appropriation.

The decision of the Agency to hold its request to a total of $9,000,000 represents a compromise between the estimate of needs determined as explained above, and the Agency's desire to conform to the spirit of the President's statement of policy, expressed in your letter of July 1. The adaptation of its program to an estimate of $9,000,000 means that the Agency must plan to defer until fiscal year 1952 the final attainment of complete currency in its handling of cases at all stages. The proposed estimate will, however, result in a continuing reduction of the trial examining backlog during the fiscal year 1951, and will result in continuing improvement in the speed with which the Agency handles matters brought to it.

There is also transmitted herewith a statement of activities contemplated during the current year and budget year which are aimed at appraising and improving the effectiveness of the Agency's operations. Where appropriate, the anticipated results of these activities are incorporated into the estimates in the form of production rates which are superior to recent performance. Most important, these activities will serve to improve the manner in which the Agency discharges its responsibility for administering its basic statute.

No major changes in the organization or operations of the Agency in fiscal year 1951 are projected at the present time. Minor changes that have already occurred or that are currently planned definitely are specifically mentioned in the justifications.

The estimate includes $50,000 as an amount which might be required for the conduct of national emergency elections under Section 209 (b) of the Labor Management Relations Act of 1947. This amount would be wholly in-

adequate in the event of several large or expensive elections, or even one election in the coal industry, for example. Should such elections materialize, the Agency would be required to request additional funds or defer conduct of its normal activities.

Finally, the Agency recognizes that even with two years' experience under the new law, and however careful its forecasts, the labor relations field is still too volatile, and there are too many variables which could affect financial requirement of this Agency, to permit the making of solid estimates. The accompanying presentation does, however, represent the careful and considered judgment of the Agency as to its 1951 fiscal year needs.

Very sincerely yours,

/s/ PAUL M. HERZOG
Chairman

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